

No. 12,715

IN THE  
**United States Court of Appeals  
For the Ninth Circuit**

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LILBURN H. BARBEAU,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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**BRIEF FOR APPELLANT.**

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**FILED**

MAR 27 1951

PAUL J. O'RIEN,  
CLERK



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**JURISDICTIONAL STATEMENT.**

This is an appeal from a judgment of conviction in the District Court for the Territory of Alaska, Third Division.

The appellant was charged in the indictment with the crime of murder in the first degree. (R. Vol. I, page 3.) He entered a plea of not guilty. (R. Vol. I, pages 5-6.) After a trial by jury, he was found not guilty of the crime of murder in the first degree, and not guilty of the crime of murder in the second degree, but found guilty of the crime of manslaughter by culpable negligence.

The District Court had jurisdiction to try the offense charged by virtue of the provisions of Sections 53-2-1 and 66-3-1 of the Alaska Compiled Laws Annotated, 1949.

This Court has jurisdiction of the appeal by virtue of the provisions of Sections 1291 and 1294 of Chapter 83 of New Title 28, U. S. Code.

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#### **STATEMENT OF THE CASE.**

Paul Gunn was shot and killed by the discharge of a Walther-P-38 automatic pistol in the hands of the appellant, Lilburn H. Barbeau. The bullet entered decedent's mouth and passing through his neck shattered one of his vertebrae, severing or partially severing the spinal cord.

This happened on the 18th of February, 1950, at about 2:30 p.m. at the residence of appellant where appellant had gone shortly before the accident in company with one Jack Howe for the purpose of trading pistols with Howe. They were driven to appellant's residence by Paul Gunn in a Cadillac car belonging to appellant which had for sometime previously and up to that time been operated as a taxicab by Gunn under a contract with appellant.

Howe was the owner of a Walther-P-38 automatic pistol of German make which he took with him at the time. Appellant possessed a weapon of the same make which he had at his residence. The circumstances which led up to the proposed exchange of

weapons are set forth in the testimony of Jack Howe (R. Vol. II, pages 1-95) and involve too much detail to be recited in this statement. The testimony in this regard is corroborated in every particular by that of the defense witness William E. Lehman (R. Vol. IV, 316-329) and Ralph Wofford (R. Vol. IV, 337), also by the appellant, and we believe it will be conceded that his testimony is true.

After the appellant, Howe, and Gunn arrived at appellant's residence all entered the house. The appellant produced his pistol and all became seated. Appellant and Howe were seated on a small settee in one corner of the room partially facing each other and about three feet apart. Gunn was seated in the other end of the room about seven feet from the appellant (R. Vol. V, 436), and about the same distance from Howe.

It was proposed and agreed that the handles or grips of the guns be exchanged, which was done, a case knife produced by Gunn from the kitchen being used as a screw driver. The appellant's gun was loaded, the clip full and a shell in the chamber. He removed the clip and shell and placed both on the cushion of the settee between himself and Howe, who changed the grips and then handed his gun now having on the grips of appellant's gun, to appellant.

Appellant took the gun from Howe, put it on safety, pulled the slide back and looked into the chamber, evidently from force of habit. Holding the gun in his left hand and in his lap he shoved in the clip

or magazine and was about to reach for the shell which he had placed on the cushion of the settee when the gun fired the bullet which struck Gunn. Evidently the impact of shoving in the clip caused the slide to fly forward, carrying a shell into the chamber, the hammer following with it. The gun being on safety could not normally be fired in this manner.

The safety of this gun was defective; consequently the gun could be fired when on safety.

The direction in which the gun was pointed would necessarily be somewhat changed by shoving in the clip.

The safety operation of the Walther-P-38 and how the gun could have been fired in the manner above described are fully explained by the testimony of Corporal Joseph Kerekes (R. Vol. V, 464-474); Kerekes was a thoroughly qualified expert.

Another expert, Peter J. Kalamardes testified to the same effect as Kerekes. (R. Vol. V, 476-485.) He testified (479) that he once owned a P-38 wherein the safety and firing pin were defective so that when the slide went forward and the lever was on safety the cartridge in the chamber exploded.

The testimony of both appellant and Jack Howe is that the gun was not raised from where appellant held it in his lap at the time it was fired.

There was no argument, no boisterous conduct, no fooling with or pointing of weapons and no drinking whatever. The three men were all on friendly terms. The shooting was accidental.

**STATEMENT OF POINTS RELIED UPON.**

1. That the indictment does not state facts sufficient to constitute the offense for which the defendant was convicted.
2. That the offense for which the defendant was convicted was not charged in the indictment and the Court was without jurisdiction to pronounce judgment.
3. That the Court erred in denying defendant's motion for acquittal, made at the conclusion of the evidence of the plaintiff.
4. That the Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence in the case and after both plaintiff and defendant had rested.
5. Insufficiency of the evidence to justify the verdict, and that it is against law, in that the indictment does not charge the offense of which the defendant has been convicted.
6. Errors in law occurring at the trial and excepted to by the defendant, as follows:
  - (a) The Court erred in overruling the motion of the defendant, made at the conclusion of all the evidence, to exclude from the exhibits to be taken by the jury, those exhibits relating to the question of motive.
  - (b) The Court erred in permitting plaintiff's exhibits 9 and 10 being unsigned purported statements

of the defendant, to be taken by the jury when they retired to consider the case.

6. The Court erred in overruling defendant's Motion in Arrest of Judgment.

In addition to the foregoing, appellant assigns error upon the trial Court's denial of the Motion for Judgment of Acquittal of Second Degree Murder, made at the conclusion of the trial and after both sides had rested. (R. Vol. V, p. 509.)

The points relied upon were raised by Motions in Arrest of Judgment, Motion for New Trial; and Motion for Judgment of Acquittal on the ground of insufficiency of the evidence to sustain the conviction, made after discharge of the jury (R. Vol. I, pages 36, 37, 38), as provided in Rule 29(b) of the Federal Rules of Criminal Procedure also by Motion for Judgment of Acquittal made at the conclusion of the government's case (R. Vol. IV, page 292), Motion for Judgment of Acquittal made at the conclusion of all the evidence (R. Vol. V, 507-9, Motion for Judgment of Acquittal of Murder in the Second Degree made at the conclusion of all the evidence. (R. Vol. V, 509.)

The motion to exclude from the jury all exhibits relating to the question of motive (Point 4(a) above) was made at the conclusion of all the evidence. (R. Vol. V, 509.)

Point 4(b) above was raised by objection made after the conclusion of all the evidence, to permitting plaintiff's exhibits 9 and 10 to be taken by the jury when they retired to consider the case. (R. Vol. V,

503-507). This objection was overruled by the Court after the argument and instructions to the jury. (R. Vol. V, 510.)

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## ARGUMENT.

### FIRST AND SECOND POINTS RAISED.

1. That the indictment does not state facts sufficient to constitute the offense for which the defendant was convicted.
2. That the offense for which the defendant was convicted was not charged in the indictment and the court was without jurisdiction to pronounce judgment.

These two points are closely connected and will be discussed together.

The crime charged is murder in the first degree. The indictment is stripped of all non-essentials; it follows the form prescribed by the Federal Rules of Criminal Procedure, and informed the accused of the nature and cause of the accusation against him, as required by the 6th Amendment to the Constitution of the United States.

It does not inform the defendant that he is about to be tried on a charge of negligent homicide, of which the defendant has been convicted.

Alaska Compiled Laws Annotated, 1949, defines manslaughter as follows:

“Sec. 65-4-4. Manslaughter. That whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter,

and shall be imprisoned in the penitentiary not more than twenty nor less than one year.

“Sec. 65-4-5.—Procuring another to commit self-murder. That if any person shall purposely and deliberately procure another to commit self-murder or assist another in the commission thereof, such person shall be deemed guilty of manslaughter, and shall be punished accordingly.

“Sec. 65-4-6.—Abortion. That if any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or such mother be thereby produced, be deemed guilty of manslaughter, and shall be punished accordingly.

“Sec. 65-4-7.—Physician administering poison, etc., or doing act resulting in death while intoxicated. That if any physician, or any person acting as or pretending to be a physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug, or medicine, or do any act to another person which shall produce the death of such other, such physician shall be deemed guilty of manslaughter, and shall be punished accordingly.

“Sec. 65-4-8.—Negligent homicide. That every killing of a human being by the culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable, shall be deemed manslaughter, and shall be punished accordingly.”

Excusable homicide is defined as follows:

“Sec. 65-4-11. Excusable homicide. That the killing of a human being is excusable when committed:

“First. By accident or misfortune in lawfully correcting a child, *or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent; \* \* \**”  
(Italics ours.)

Rule 7(c) of the Federal Rules of Criminal Procedure provides as follows:

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Rule 31(c) of the Federal Rules of Criminal Procedure provides as follows:

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein, if the attempt is an offense.

**The offense of manslaughter by culpable negligence is not necessarily included in a charge of murder in the first degree.**

It is conceded that manslaughter as defined in Section 65-4-4, above, is necessarily included in the offense charged in the indictment because, as required by Federal Rule 7(c), every essential fact constituting manslaughter, as thus defined, is charged in the indictment. But the species of homicide defined in the

following four sections of the Alaska Code, above quoted, namely: manslaughter by procuring another to commit self-murder, manslaughter by abortion, manslaughter by physician administering poison, etc. and manslaughter by negligent homicide, are not included in the offense charged in the indictment because all the essential facts constituting these offenses are not charged in the indictment.

As to the first three kinds of homicide last above mentioned, none of the essential facts constituting the offense are charged, except the killing. As to manslaughter by negligent homicide, the killing is charged in the indictment and that it was accomplished by shooting with a pistol, but the third essential fact, namely, that the killing was the result of culpable negligence on the part of the defendant is not included in the offense charged in the indictment.

The basic test must be, that the indictment must inform the defendant of the nature and cause of the accusation against him.

Any offense of which he is not so informed by the indictment necessarily cannot be considered an included offense.

The rule is stated in American Jurisprudence, Vol. 27, as follows:

“Sec. 194. Offenses of Lesser Degree and Included Offenses. It is a well established general rule that when an indictment charges an offense which includes within it another, lesser offense, or one of a lower degree, the defendant although

acquitted of the higher offense, may be convicted of the lesser. \* \* \*”

“This Rule is embodied in the statutes in many jurisdictions. The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, *and that the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense.* (Italics ours.)

“If the greater of two offenses includes *all* the legal and *factual* elements of the lesser, the greater includes the lesser, but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater.” (Italics ours.)

Vol. 27, Am. Jur., sec. 194, citing

*Watson v. State of Georgia*, 43 S.E. 32;

*State v. Woolman* 33 P. (2d) 640, and other cases.

“It is also the rule, both at common law and under the statutes of many of the states, that an indictment or information is insufficient to charge the accused with a commission of a minor offense, or of one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense or sufficiently sets them forth by separate allegations in an added count.” Vol. 27, Am. Jur., Sec. 105.

The rule is stated in *State v. Woolman, supra*, as follows:

“Greater offense includes lesser offense only when greater offense includes all legal and factual elements required to constitute lesser offense.

“Under provisions that accused may be found guilty of any offense, the commission of which is ‘necessarily included’ in that with which he is charged, the lesser offense must not only be a part of the greater in fact, but must be embraced within the legal definition of the greater as a part thereof, \* \* \*”

42 C.J.S., sec. 273, citing

*People v. Kerrick*, 77 Pac. 711;

*People v. McGrath*, 271 Pac. 549;

*State v. Woolman*, 33 P. (2d) 640.

This Court, in *Giles v. U. S.*, 144 F. (2d) 860, has very succinctly stated the rule as follows:

“To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.”

Citing:

*House v. State*, 117 N.E. 647.

See also:

*Wood v. Commonwealth*, 7 S.W. 391.

The rule, as stated by this Court, would seem to dispose of this matter, but the trial Court in disposing of the motions of the defendant commenting upon this subject, states as follows:

"The defendant contends that since, with respect to murder in the first degree, the necessary charge is that the killing is voluntary, manslaughter through culpable negligence contains an element not included in the first degree murder, to wit, negligence. It is obvious that the killing of a human being by the culpable negligence of another under Alaska Law, as set forth in Section 65-4-8 above quoted, is a species of manslaughter, and nothing else. The law so declares it. It is equally plain that the gist and essence of the offense of manslaughter lies in the unlawfulness of the killing, whether voluntary or involuntary. It cannot rightly be said that negligence is an essential element of the crime necessary to be charged in the indictment, the only necessary, indispensable element being that the killing is unlawful. A negligent killing is merely one kind of unlawful killing. The question of negligence is subordinate to the main issue; it merely defines the type and is a matter of detail. Nothing to the contrary appears in the case of *Giles v. United States*, 144 F. (2d) 860, 9th Cir. in which the rule on the subject is quoted as follows:

'To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.'

"In the instant case, the greater offense with which the defendant was charged was murder in the first degree involving a killing done purposely and by deliberate and premeditated malice. Under both types or species of the crime of manslaughter it is required only that the killing be

unlawful. Even in Sec. 65-4-4, supra, which embraces voluntary manslaughter, there is no statutory requirement of purpose or intent; and, of course, under Sec. 65-4-8, supra, dealing with negligent homicide, it is assumed that purpose or intent to kill are absent. Hence, it logically follows that every essential element of manslaughter by negligent homicide is necessarily included in the offense of murder in the first degree charged in the indictment." (Opinion of the Trial Court—Record Vol. I, pages 52-54.)

We agree with the trial Court that "the killing of a human being by the culpable negligence of another" is a species of homicide which the statute says "shall be deemed manslaughter" and that "the gist of the offense lies in the unlawfulness of the killing." We cannot agree, however, that culpable negligence is not a factual element of the offense of manslaughter by culpable negligence nor that a man can be convicted of this offense without being charged with it.

The trial Court in its opinion cites California and Oregon cases to sustain its view that the indictment in this case includes a charge of manslaughter by culpable negligence.

*People v. Pearne*, 50 Pac. 376 (1897), a California case, is quoted as follows:

"An indictment laid for murder charges an intentional killing, yet under the criminal practice and procedure in this state there is no doubt but that a verdict of involuntary manslaughter would find support in such a pleading."

"This is so because involuntary manslaughter is 'the unlawful killing of a human being' and such crime is always in an indictment for murder."

The trial Court quotes *State v. Nortin*, 133 P. (2d) 252, an Oregon case, as follows:

"The statute provides 'in all cases the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime. OCLA, sec. 26-948.'

"Under this statute, all degrees of homicide, including voluntary and involuntary manslaughter, are in the eyes of the law included in the charge of murder in the first degree." (R. Vol. I, 54-55.)

Other authorities are cited in the trial Court's opinion to the same general effect.

According to these decisions, the general rule stated by this Court in the *Giles* case, *supra*, does not apply to homicide. This conclusion seems to be arrived at by a syllogistic line of reasoning resulting in the abstract proportion that all species of manslaughter are necessarily included within the crime of murder, whether or not charged within the language of the indictment.

The trial Court states that the Oregon cases are cited because of similarity existing between the laws of Oregon and Alaska with respect to homicide. As a

matter of fact, there is considerable difference as far as the question here involved is concerned.

Section 23-406 O.C.L.A. provides:

“If any person shall, in the commission of an unlawful act without due caution or circumspection, involuntarily kill another such person shall be deemed guilty of manslaughter.”

The laws of Alaska contain no section defining involuntary manslaughter.

Section 23-410 O.C.L.A. provides:

“Every other killing of a human being by act, procurement or *culpable negligence* of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable as provided in this chapter, shall be deemed manslaughter.” (Italics ours.)

The Alaska section defining negligent homicide is again quoted as follows:

“Sec. 65-4-8.—Negligent homicide. That every killing of a human being by the culpable negligence of another when such killing is not in the first or second degree or is not justifiable or excusable, shall be deemed manslaughter and shall be punished accordingly.”

It will be noticed that in the Oregon definition of negligent homicide the words “by act, procurement or culpable negligence” are used, while in the Alaska statute the words “act, procurement” are omitted. Also, the Oregon statute defines involuntary manslaughter while the Alaska statute does not.

The Alaska Code, section 65-4-11, defines excusable homicide as follows:

“First. By accident or misfortune in lawfully correcting a child, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent.”

Thus it will be noticed that under the Oregon laws every killing of a human being which is not justifiable or excusable is deemed manslaughter, while under the Alaska laws, which do not define involuntary manslaughter, a homicide in order to constitute manslaughter under the definition of negligent homicide, the killing must not only be not excusable and not justifiable, but must be committed with *culpable* negligence. The question arises, what would be necessary to charge in an indictment for manslaughter by culpable negligence? The Supreme Court of Oregon has answered this question in *State v. Miller*, 243 Pac., page 74(3):

“(3) If the defendant had been indicted for having committed the crime of involuntary manslaughter by the doing of a lawful act ‘without due caution or circumspection,’ it would have been necessary under that theory to have alleged specifically the facts constituting such negligence. The rule in alleging negligence in civil actions would then apply. This distinction in pleading is recognized in *People v. Ryczek*, 224 Mich. 106, 194 N.W. 609, and in *People v. Townsend*, 214 Mich. 267, 183 N.W. 177, 16 A.L.R. 902. In the latter case the court said:

“ ‘The distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony and the offense arising out of some negligence or fault in doing a lawful act in a grossly negligent manner and from which death results must be kept in mind upon the question of pleading. In the former case it is sufficient to allege the unlawful act with sufficient particularity to identify it and then to charge that as a consequence the defendant caused the death of the deceased, and there is no need to aver in detail the specific acts of the accused; but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged, as well as the acts of the accused constituting failure to perform or improper performance.’

“Appellant relies strongly upon *State v. Gesas*, 49 Utah, 181, 162 P. 366; but an examination of the indictment in that case discloses the crime of involuntary manslaughter was not based upon the commission of an unlawful act. The court very properly held that the facts constituting the alleged negligent operation of the automobile should have been pleaded and not conclusions upon which no issue could be joined. \* \* \*”

Section 147, page 1036, 40 C.J.S. is as follows:

“Sec. 147.—Omission of Duty or Negligence.

“Where the homicide is charged to have resulted from a negligent act or omission the indictment or information must be with certainty

sufficient to put the accused on notice of the offense with which he is charged. The act or omission must be alleged and such facts and circumstances as are essential to show negligence, but the duty violated, or the standard of care required, ordinarily need not be averred."

Citing D.C.—*U.S. v. Geare*, 293 F. 997, 54 App.

D.C. 30;

Mich.—*People v. Maki*, 223 N.W. 70, 245 Mich. 455;

N. M.—*State v. Gray*, 30 P. (2d) 278, 282, 38 N.M. 203, quoting *Corpus Juris*;

Okl.—*Vaughn v. State*, 276 P. 701, 42 Okl. Cr. 376;

Or.—*State v. Miller*, 243 P. 72, 119 Or. 409, affirmed *Miller v. State of Oregon*, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825;

30 C.J. p. 97, note 27.

We believe no Federal Court has ever dispensed with the requirement that an indictment must inform the defendant of the nature and cause of the accusation against him.

If the reasoning of the *Miller* case, *supra*, is sound, which it appears to be, then some degree of detail is required in drawing an indictment charging "involuntary manslaughter by the doing of a lawful act without due caution or circumspection."

At least as much detail should be required in charging culpable negligence as in charging ordinary negligence.

Confronted with the necessity of pleading these necessary details it certainly would be a labor saving device for the pleader to charge murder in the first degree, and thus giving the defendant as little information as possible.

The *Pearne* case, *supra*, a California case, cited by the trial Court seems to support the Court's views, yet in *People v. McGrath*, 271 Pac. 549, another California case, the Court says:

"Under penal code, section 1159, authorizing a jury to find defendant guilty of any offense, the commission of which is necessarily included in the offense with which he is charged, to be 'necessarily included' in offense charged, lesser offense must not only be a part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof." (Syllabus.)

We contend that the true rule as to the conviction of an included offense is stated in *Watson v. State of Georgia*, as follows:

"But the general rule is to be qualified to the extent that the lesser offense must either necessarily be included in a general charge of the greater, or, if it may or may not be, then the averments of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser.

"Under an indictment for murder the accused may be convicted of a lower grade of felony, or even of a misdemeanor, if the lesser offense is one

involved in the homicide, and is sufficiently charged in the indictment.” (Syllabus.)

*Watson v. State of Georgia*, 43 S.E. 32.

In *Hill v. State*, 11 N.E. (2d) 141, an Indiana case, the defendant was convicted of involuntary manslaughter on a charge of voluntary manslaughter. The opinion states:

“(4) In instruction No. 9 given by the court of its own motion, the jury was instructed that they could return one of three verdicts, viz.: One of not guilty, or one of voluntary manslaughter, or one of involuntary manslaughter. This instruction is clearly erroneous. The appellant was charged in the affidavit with voluntary manslaughter, and one so charged cannot be found guilty of involuntary manslaughter. The two degrees of manslaughter are distinct and different crimes. *Bruner v. State* (1877) 58 Ind. 159; *Adams v. State* (1879) 65 Ind. 565; *State v. Lay* (1884) 93 Ind. 341. In the latter case it is said: ‘An indictment for voluntary manslaughter will not support a conviction for involuntary manslaughter, and vice versa. \* \* \* Though the penalty is the same in both, the crimes of voluntary and involuntary manslaughter are as separate and distinct as those of grand larceny and robbery.’ \* \* \*”

In the trial Court’s opinion (R. Vol. I, 57-58) is the following:

“The defendant’s present theory of the law finds no support in the Sixth Amendment, providing that ‘the accused shall enjoy the right \* \* \* to be informed of the nature and cause of

the accusation.' The indictment charged that the defendant ' \* \* \* killed Paul Gunn by shooting the said Paul Gunn with a pistol.' That information was so circumstantial and complete that the defendant, although represented by two able and experienced counsel of his own choosing, made no request or demand for a bill of particulars or in any other manner asked to be further 'informed of the nature and cause of the accusation.' In fact, defendant through his counsel proposed to the Court instructions to the jury of the precise nature given and upon the very issue of which he now complains. The charge of the indictment that the defendant 'killed Paul Gunn by shooting the said Paul Gunn with a pistol' is explicit. The indictment further charged that the killing was unlawful, not that the word 'unlawful' was used in the indictment, but because that averment was necessarily included in the crime charged. The jury found the defendant guilty of an unlawful killing, and the law says an unlawful killing without more, is manslaughter. So the requirements of the Sixth Amendment were fully met."

A demand for a bill of particulars, if granted, could have afforded no information to the defendant as to the crime of manslaughter by culpable negligence without stating facts, which if originally contained in the indictment, would have been repugnant to the charge of murder in the first degree and contradictory thereof.

In this connection we call attention to *People v. Hoffman*, 220 N.Y.S. 249, where a similar situation is presented.

It is true as stated by the trial Court that appellant's counsel "proposed instructions to the jury of the precise nature given and upon the very issue of which he now complains."

The answer is that the point here raised is lack of jurisdiction, and jurisdiction cannot be stipulated nor lack of jurisdiction waived.

The defendant moved for a judgment of acquittal both at the conclusion of the government's case and at the conclusion of all the evidence, and after verdict the Court denied all these motions, the points here raised were stated in the Motion for Arrest of Judgment. (R. Vol. I, 36.)

The Third and Fourth Points Raised have been covered by the argument on the First and Second Points.

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#### **FIFTH POINT RAISED.**

**Insufficiency of the evidence to justify the verdict and that it is against law.**

The point that the verdict was against law has been fully covered by the argument on the first and second points raised.

The question of insufficiency of the evidence to justify the verdict was raised by the several motions for judgment of acquittal, and the motion for new trial.

The appellant was found guilty of manslaughter by culpable negligence. The trial Court instructed the jury as follows:

“‘Culpable negligence’ as used in the law which applies in this case, is negligence of such a degree, so gross and wanton, as to be deserving of punishment, or criminal. Culpable negligence is something more than the slight negligence necessary to support a civil action for damages. Culpable negligence implies a reckless disregard of consequences, a needless indifference to the rights and safety and even the lives of others.

“The word ‘wanton’ has been used in these instructions. As so used, a ‘wanton’ act is one that is marked by, or which manifests, arrogant recklessness of justice or the rights of others; a reckless disregard for the safety of another.” (R. Vol. I, 13, 14.)

However, in the trial Court’s opinion some doubt is expressed as to whether its instructions were not too favorable to the accused. (R. Vol. I, 49-51.) Therefore, a brief review of the authorities on this question is deemed proper.

In *Reed v. Madden*, 87 F. (2d) 851 (1) the Court says:

“(1) The pertinent principle of law with respect to the degree of negligence essential to the crime of manslaughter is well stated by the Supreme Court of Missouri in *State v. Melton*, 326 Mo. 962, 33 S. W. (2d) 894, 895: ‘To make negligent conduct culpable or criminal and make it manslaughter, the particular negligent conduct of the defendant must have been of such a reckless or wanton character as to indicate on his part utter indifference to the life of another who is killed as a result thereof. Thus only may the

criminal intent, so essential in a criminal prosecution, properly be found by the jury.'

"It is difficult to ascribe to Reed either any intent to injure, or this essential degree of wanton and reckless conduct, under the circumstances and conditions by which he was surrounded. \* \* \*"

In *State v. Powell* (Mont.), 138 P. (2d) 950, the Court says:

"(1, 2) This court has never defined what is meant by the italicized portion above, that is, what degree of negligence is necessary to impose criminal responsibility. This question, however, is well settled in other jurisdictions. The general rule is stated in 26 Am. Jur., page 299, as follows: 'The authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to impose criminal liability for a homicide caused by negligence, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard for human life or an indifference to consequences.' "

It will be noted that in the *Powell* case the rule was applied to involuntary manslaughter in the commission of the lawful act which might produce death,

in an unlawful manner, *or without due caution or circumspection.*

The statute violated did not use the term "culpable negligence."

"Negligence relied upon to constitute manslaughter under Comp. St. 1920, sec. 7070, must be more than ordinary negligence and must be culpable or criminal in its nature. *State v. McComb*, 239 Pac. 526 (Syllabus.)"

We call attention to the authorities collated on page 528 (2) of the opinion in the *McComb* case.

In a note to *Smith v. State of Mississippi*, 161 A.L.R. 10, the decisions of all the state courts on the subject of Homicide Through Culpable Negligence are collated. On page 17 the note states:

"Relation to ordinary negligence. Prior to presenting specific definitions of the terms, consideration will be given to the relationship of 'culpable' and 'criminal' negligence to ordinary, actionable negligence. For leading definitions, see *infra*, this subdivision, under subhead 'Definitions.'

In most of the jurisdictions where the question has come before the courts, the term 'culpable negligence,' as used in a particular manslaughter statute, has been construed as meaning negligence of a higher degree than ordinary negligence which suffices as a basis for liability in a civil action."

Numerous decisions in support of this text are then cited from, United States, Florida, Kansas, Minnesota,

Mississippi, Missouri, New Jersey, Oklahoma, South Dakota and Wyoming.

The following extract from this annotation, page 39, is especially applicable to all the aspects of the point here under discussion:

“The modern leading case upon the present subject in New York is *People v. Angelo* (1927) 246 NY 451, 159 NE 394 (affirming (1926) 219 App Div 646, 221 NYS 447, which reversed a conviction of manslaughter in the second degree as to which certificate of reasonable doubt was granted in (1926) 126 Misc 448, 214 NYS 499). In this case the Court of Appeals, in a distinguished opinion by Andrews, J., carefully examined the judicial and legislative history of the expression ‘culpable negligence’ in the New York manslaughter statute, tracing it back to the common law, and reached the conclusion: “‘Culpable’ negligence is therefore something more than the slight negligence necessary to support a civil action for damages. It means, disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment—ordinarily for the judgment of the jury, as is the question whether negligence exists at all; but in the one case as in the other it may become a question of law. If the negligence is so slight as not to reach the required standard, the court should advise an acquittal of the accused. Under such circumstances the jury may not be allowed to find a verdict of guilty. \* \* \* (In the case at bar the

trial judge) refused to charge that slight negligence was not culpable but left it to the jury to say whether it was or was not. This was error and under the facts of the case substantial error. However indefinite the rule, however uncertain the meaning of such words as 'gross,' 'wanton,' 'reckless,' 'slight,' yet in view of the facts of a particular case, both the rule and the words do convey an idea to the jury sufficient to guide their action." The court, after reviewing the common law as to manslaughter through negligence and the meaning of culpable or criminal negligence at common law, said that it seemed clear that the legislature used the word 'culpable' in the same sense as it had been used for centuries—"as the equivalent of 'criminal,' 'reckless,' 'gross,' such negligence as is worthy of punishment." The court also pointed out: "As to precedents at least as early as 1664 the distinction is made between negligence so great as to be blameworthy and, therefore, deserving punishment and the slight degree of negligence that would not justify a criminal charge. \* \* \* And later cases reiterate this settled rule. \* \* \* They use such words as 'gross,' 'reckless,' 'culpable.' Consistently they assert, expressly or by implication, that something more is required than the bare negligence that might be sufficient to support a civil action. They hold that it is for the jury to decide, in view of all the circumstances, whether the act was of such a character as to be worthy of punishment."

We also quote from *United States v. Geare*, 293 Fed., page 1000 (3, 4, 5):

“(3, 4) This brings us to the second branch of the case, the failure of the indictment to state facts sufficient, if true, to establish criminal negligence. The negligence, here sought to be charged against these defendants, occurred while they were engaged in the performance of lawful acts. In such cases the indictment must set out with the utmost clearness the facts upon which criminal negligence is predicated. In this the present indictment is lacking. Indeed, it fails to meet any of the established rules of criminal pleading. An indictment should contain every essential fact necessary to clearly define the crime, and the offense sought to be charged should be set out with sufficient accuracy and completeness to support a judgment, either upon demurrer or conviction. It is true that the indictment charges the defendants collectively with undertaking and assuming to construct and erect the building, and to plan, design, fabricate, and furnish materials therefor, and that in so doing they unlawfully feloniously, and carelessly failed and neglected to perform their separate assumptions and obligations in a careful and skillful manner. But these are merely conclusions of the pleader. Nowhere does it appear in what particular the cement, or brick, or steel work was defective; nor does it appear in what respect the plans and specifications and superintendence or inspection of the work contributed to the accident.

“(5) The reason for the requirement that all the material facts and circumstances, essential to a clear definition of the offense, must appear in the indictment, is, first, to furnish the accused with such a description of the charge against

him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.' United States v. Cruikshank, 92 U.S. 542, 558 (23 L. Ed. 588)."

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#### **SIXTH POINT RAISED.**

"6. Errors in law occurring at the trial and excepted to by the defendant, as follows:

(a) The court erred in overruling the motion of the defendant, made at the conclusion of all the evidence, to exclude from the exhibits to be taken by the jury, those exhibits relating to the question of motive.

(b) The court erred in permitting plaintiff's exhibits 9 and 10 being unsigned purported statements of the defendant, to be taken by the jury when they retired to consider the case."

Point 6(a). The appellant went to trial on a charge of murder in the first degree. Most of the time consumed in the trial of the case by the government was used in an effort to prove motive, and documentary evidence was introduced in an effort to prove that the defendant Barbeau was involved in the theft

of an automobile transmission and that Paul Gunn, the man killed, had been interviewed by the police regarding this matter, the inference being that Barbeau feared exposure at the hands of Gunn and therefore had a motive for putting him out of the way. At the conclusion of the trial the Court indicated that the question of murder in the first degree would be taken from the jury and thereupon appellant's counsel moved that all exhibits relating to the question of motive be excluded from the exhibits taken by the jury. The motion was denied.

These exhibits were plaintiff's exhibits Nos. 9, 10, 11, 12 and 13.

The question of murder in the second degree was not taken from the jury but it is difficult to see how evidence of motive could have any bearing upon that degree of the crime.

The jury, as instructed, returned a verdict of Not Guilty of Murder in the First Degree. However, having had their minds directed to that issue during a greater part of the trial and that issue having been eliminated, not only should the jury have been instructed to disregard all evidence of motive, but all exhibits relating thereto should have been excluded and not left with them as a constant reminder that the accused was suspected of larceny and that fear of exposure of larceny was a motive for murder.

The remarks of this Court in *Karn v. United States*, 158 F. (2d) 572 (9, 10), on a similar situation are applicable on this point.

It is also to be remembered that in this case objection was made to the taking of the exhibits by the jury and the motion to exclude them was argued. (R. Vol. V, 509.)

There was no inadvertence or mistake as in the *Karn* case.

Point 6(b). Specific objection was made to plaintiff's exhibits 9 and 10 being taken by the jury. (R. Vol. V, 503-7.) These exhibits were unsigned statements of the defendant Barbeau, used to refresh the recollection of government witnesses. No objection was made to their introduction in evidence. It was conceded by the Court (R. Vol. V, 507) that they would have been excluded if objection had been made. However, these exhibits come under the general objection made to all exhibits relating to the question of motive.

The Seventh Point raised, erroneously numbered 6, that the Court erred in overruling defendant's Motion in Arrest of Judgment was covered in the argument on the First and Second Points.

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#### **MURDER IN THE SECOND DEGREE.**

Error is assigned on the trial Court's denial of the Motion for Judgment of Acquittal of Second Degree Murder made at the conclusion of the trial and after both sides had rested. (R. Vol. V, 509.) Murder in the second degree is defined in the Court's instruction No. 2 as "the killing of a human being purposely and

maliciously", and purposely as "intentionally and not accidentally". (R. Vol. I, 10.)

Of course, both these elements are included in a charge of murder in the first degree.

Instruction No. 2 also defines malice, both actual and personal malice, and the malice implied from the intentional firing of a deadly shot.

The Court, having eliminated murder in the first degree from the case, it is difficult to understand on what theory murder in the second degree was left in the case.

There was no evidence whatever connected with the circumstances of the shooting, nor elsewhere in the record, to indicate purpose, malice or intent.

Leaving second degree murder in the case necessarily invited the jury to consider that charge. They were virtually told by the Court that there was some evidence of second degree murder, that there was some evidence of purpose, malice and intent, when in fact there was none. The ruling of the Court denying the Motion for Acquittal of Second Degree Murder was error and if error was manifestly highly prejudicial.

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#### **CONCLUSION.**

The appellant was indicted for murder in the first degree and convicted of manslaughter by culpable negligence.

There may have been sufficient evidence in support of murder in the first degree to warrant a bind-over, but not sufficient evidence to justify an indictment on that charge, and not sufficient to submit to the trial jury and the trial Court so ruled. However, in their laudable efforts to suppress crime, prosecuting attorneys are sometimes prone to secure indictments for the greater offense in order to facilitate the conviction of a lesser offense. Such tactics do have that tendency. Also, there is always the hope that some additional evidence may drop in from somewhere.

The appellant was compelled to defend himself on a charge of manslaughter by culpable negligence on an indictment for murder in the first degree. It cannot be contended that the indictment gave the appellant the slightest inkling that he was charged with the lesser offense. That being the case, it cannot in reason be held that the lesser offense was a necessarily included offense within the meaning of the Federal Rules of Criminal Procedure or the rule laid down by this Court in the *Giles* case, *supra*. No authorities can be cited contrary to the decision in the *Geare* case, *supra*, as to the essentials of an indictment for negligent homicide. It cannot be possible that such essentials can be avoided by charging a greater offense.

The appellant is entitled to a reversal on the first and second points relied upon.

The appellant was handicapped by the case being submitted to the jury on a charge of murder in the second degree. While there was no evidence to sustain

that charge, the jury was virtually told that there was such evidence, which left the question a subject for debate. Such a situation was not calculated to enable the jury to fairly and impartially consider the question of whether the negligence ascribed to the defendant amounted to the degree of negligence which constitutes culpable negligence.

The appellant was also handicapped by the fact that evidence in the form of exhibits relating to the charge of murder in the first degree was allowed to go to the jury when they retired. This procedure was contrary to the views of this Court expressed in *Karn v. U. S., supra*. This error by itself may have been sufficiently prejudicial to warrant a reversal.

As to the sufficiency of the evidence to justify the verdict, the question of whether negligence is culpable or not is ordinarily one for the jury. In *People v. Angelo*, referred to in the note to *Smith v. State of Mississippi*, above, which is set forth in full on page 26 of this brief, the case was reversed because the trial judge refused to charge that slight negligence was not culpable but left it to the jury to say whether it was or not.

Certainly the evidence in the present case did not show the degree of negligence necessary to constitute culpable negligence as defined in the trial Court's instructions which were that culpable negligence implies a reckless disregard of consequences, a heedless indifference to the rights and safety and even the lives of others.

No such degree of negligence was shown by the evidence.

We do not believe that if the appellant had been tried on the charge for which he was convicted, on the evidence relating to that charge alone, a conviction could have possibly resulted.

Neither the appellant nor the witness Howe had ever been convicted of a crime. The jury must have been influenced by other considerations than the evidence relating to the homicide itself.

Their verdict must have been the result of prejudice created in the minds of some of them by the indictment of murder in the first degree, by the submission to them of the charge of murder in the second degree and by the retention of exhibits not properly before them, all of which taken together were calculated to render their minds incapable of fairly discriminating between negligence and the culpable negligence necessary to justify a conviction.

We submit that the judgment of conviction should be reversed.

Dated, Anchorage, Alaska,

March 23, 1951.

Respectfully submitted,

GEORGE B. GRIGSBY,

*Attorney for Appellant.*